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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANGEL NATHAN DENIS, Defendant and Appellant.	B209378 (Los Angeles County Super. Ct. No. KA081881)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Chung L. Mar and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Angel Nathan Denis appeals from a judgment entered after a jury returned a guilty verdict against him for count 1, murder (Pen. Code, §187);[1] count 2, attempted murder (§§ 664, 187); counts 3 and 4, shooting at an inhabited dwelling (§ 246); and count 5, possession of a firearm by a felon (§ 12021, subd. (a)(1).) The jury found true as to counts 1 and 2 that appellant personally used a firearm within the meaning of section 12022.53, subdivisions (b) and (c). The jury also found true as to counts 1, 2, and 3 that appellant personally discharged a firearm within the meaning of section 12022.53, subdivision (d).

The trial court sentenced appellant to 70 years to life as follows: as to count 1, 25 years to life for murder, plus 25 years to life for the firearm enhancement (§ 12022.53, subd. (d)); as to count 2, a consecutive term of life with the possibility of parole for attempted murder plus 20 years for the firearm enhancement (§ 12022.53, subd. (c)), to be served consecutively to count 1; and as to count 5, the midterm of two years for possession of a firearm, to be served concurrently to the term in count 1. The trial court stayed the terms for the remaining firearm enhancement pursuant to sections 12022.53 subdivision (b) and 12022.53 subdivision (c) in counts 1 and 2. The terms imposed for counts 3 and 4 were stayed pursuant to section 654.

Appellant contends that: (1) the trial court erred in failing to issue clarifying instructions with respect to CALJIC No. 1.22 and CALJIC No. 8.11; and (2) the sentence on count 5 must be stayed pursuant to section 654.[2]

We disagree and affirm the judgment.

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[1] All further statutory references are to the Penal Code.

[2] In his reply brief, appellant withdraws the request made in his opening brief that the trial court be directed to correct the number of days of actual custody credit. As acknowledged by appellant's counsel in a letter to this court dated November 15, 2008, the trial court corrected the abstract of judgment to show 169 rather than 137 days of actual custody credit.

FACTS AND PROCEDURAL HISTORY

On January 23, 2008, appellant, who lived with his family near Gilbert Valenzuela (Valenzuela), shot and killed Ruben Perez (Perez) who was visiting Valenzuela. That evening, around 11:00 p.m., appellant used a sawed off shotgun to shoot Perez in the face through a sliding glass door as Perez walked over to see who was in the backyard patio area. Immediately after the shooting, Valenzuela saw appellant dancing in the yard and holding a shotgun in one raised hand, shouting, "Woo Woo." Appellant was wearing a black hooded sweater that partially covered his eyes. When appellant saw Valenzuela looking at him, he retreated to the back of the yard. Appellant then came back to the sliding glass door, kicked through it, and entered the house. Valenzuela left through the front door. Appellant confronted Valenzuela in the driveway and Valenzuela was able to recognize him because his hood had fallen off his head. Appellant shot at Valenzuela's face from three inches away. Fortunately, Valenzuela turned his face aside and backed away, and Valenzuela was not injured. Valenzuela called 911 and reported that appellant, who lived around the corner, had shot Perez. Other neighbors reported hearing loud gunshots. One of the neighbors heard his dog barking for about 20 minutes before the neighbor heard the first gunshot.

Luis Denis (Denis), appellant's father, had been searching for appellant that evening. He returned home to find appellant in front of his house. Upon appellant's request, Denis drove appellant, whom he believed to be under the influence of methamphetamine, to the residence of Angel Ortiz (Ortiz) at around 1:00 a.m. on January 24, 2008. Appellant told Ortiz that he was in trouble and asked to spend the night. Ortiz believed that appellant seemed a little nervous, but otherwise appeared normal. After dropping appellant off, Denis went to the crime scene and told police officers that appellant had drug problems and that he might be involved in the crime. Denis drove with the officers to Ortiz's house where police officers apprehended appellant.

Appellant's shoes, which were consistent with the shoe prints found at the crime scene, contained small shards of glass. West Covina Police Department Detective Doug Murray, who interviewed appellant when he was detained, did not believe appellant was under the influence of methamphetamine. Detective Murray unsuccessfully searched for the shotgun that appellant said he had thrown out of the window of the car when his father drove him to Ortiz's house.

DISCUSSION

I. The trial court properly instructed with CALJIC No. 1.22 but any error in failing to issue clarifying instructions with respect to CALJIC No. 1.22 and CALJIC No. 8.11 was harmless

A. The trial court did not err in instructing with CALJIC No. 1.22

Appellant complains that the trial court's failure to clarify to the jury that CALJIC No. 1.22 applied only to the charge of shooting at an inhabited dwelling and not to the murder and attempted murder charges was error. But, where a defendant failed to request clarifying or amplifying language in the trial court for instructions that were otherwise correct in law and responsive to the evidence, he or she has waived these issues on appeal. (*People v. Sanders* (1995) 11 Cal.4th 475, 573.) Here, appellant did not request clarifying instructions and has waived his argument. In any event, we conclude that CALJIC No. 1.22 was properly given with respect to the section 246 violation and any error was harmless.

It is true as appellant submits, that the trial court has a duty to instruct the jury on all elements of the case submitted to it. (*People v. Shade* (1986) 185 Cal.App.3d 711, 714.) It is also true that "[w]hether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677.) Here, the jury was specifically instructed with CALJIC No. 1.01 to consider the instructions as a whole, and we presume it followed the instructions. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919.)

CALJIC No. 1.22 provides: "The words 'malice' and 'maliciously' mean a wish to vex, defraud, annoy or injure another person, or an intent to do a wrongful act." In considering the entire instructions, the jury must have concluded that the definition of malice set forth in CALJIC No. 1.22 applied to the crime of shooting at an inhabited dwelling. CALJIC No. 9.03, as given, specifically stated that: appellant was accused in "counts 3 and 4 of having committed the crime of shooting at an inhabited dwelling house, a violation of section 246," and that "every person who willfully, unlawfully and *maliciously* discharges a firearm at an inhabited dwelling house is guilty of the crime of shooting at an inhabited dwelling house in violation of Penal Code section 246." (Italics added.)

Similarly, in reading the instructions as a whole, the jury must have applied CALJIC No. 8.11, specifically defining *malice aforethought*, to the murder charge. CALJIC No. 8.10, as given, provided: "Defendant is accused in [Count] 1 of having committed the crime of murder, a violation [of] section 187 of the Penal Code. [¶] Every person who unlawfully kills a human being with *malice aforethought* is guilty of the crime of murder in violation of Penal Code section 187. [¶] A killing is unlawful, if it [was neither] justifiable nor excusable. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; and [¶] 3. The killing was done with *malice aforethought*." (Italics added.) CALJIC No. 8.11 provided: "'Malice' may be either express or implied. Malice is express when there is manifested an intention unlawfully to kill a human being. Malice is implied when: [¶] 1. The killing resulted from an intentional act; [¶] 2. The natural consequences of the act are dangerous to human life; and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When it is shown that a killing resulted from an intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of *malice aforethought*. [¶] The mental state constituting *malice aforethought* does not necessarily require any ill will or hatred of the person killed. [¶] The word

'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act." (Italics added.)

And, other instructions specified the requirement of *malice aforethought* for murder and attempted murder. CALJIC No. 8.20 instructed that murder of the first degree is murder perpetrated by willful, deliberate and premeditated killing with *express malice aforethought*; CALJIC No. 8.30 instructed that murder of the second-degree is the unlawful killing of a human being with *malice aforethought*; and CALJIC No. 8.66 instructed that attempted murder is the unlawful killing of a human being with *malice aforethought*.

Even assuming that the trial court erred by failing to give a clarifying instruction, any error was harmless because it has been uniformly held that an error in instructing with CALJIC No. 1.22 in a murder case where the jury has also been instructed on malice aforethought with CALJIC No. 8.11 is harmless error. (*People v. Chavez* (1951) 37 Cal.2d 656, 666-667 [no prejudice where jury improperly instructed with definition of malice in terms of section 7 because malice was also defined by section 188 as an element of the crime of murder]; *People v. Harris* (1985) 175 Cal.App.3d 944, 956 [error in instructing with CALJIC No. 1.22 is harmless where the court also is instructed on malice aforethought as defined in section 188 and embodied in CALJIC No. 8.11]; *People v. Shade*, *supra*, 185 Cal.App.3d at p. 715 [instructional error in giving CALJIC No. 1.22 as well as CALJIC No. 8.11 in murder case does not require reversal because the evidence supported a conviction only on the correct "intent" theory of malice].)

Furthermore, both the People and defense counsel argued in closing argument that express malice as given in CALJIC No. 8.11 pertained to the murder and attempted murder charges, and that the definition of malice in CALJIC No. 1.22 applied to the charge of shooting at an occupied dwelling. And, neither the People nor defense counsel suggested in closing argument that the general definition of malice as given in CALJIC No. 1.22 applied to the murder and attempted murder charges. Thus, the People urged

that the first-degree murder charge was based on express malice because appellant intended to kill Perez. The People also argued that appellant acted with express malice in attempting to kill Valenzuela. And, as to counts 3 and 4, the People claimed that in shooting at the house, appellant acted maliciously, meaning "that he did it to vex the person or injure a person." In his closing argument, defense counsel conceded that the crime against Valenzuela was attempted murder. He also urged that the crime was not first degree murder, but pointed at the most to second degree murder.

In any event, it is not reasonably probable that a more favorable result would have been reached had the trial court clarified that CALJIC No. 1.22 applied only to the crime of shooting at an inhabited dwelling. The evidence supports the jury's finding that appellant acted with the intent to kill with respect to the murder and attempted murder by jumping over a fence to Valenzuela's backyard, and hiding in the backyard for at least 20 minutes, which was the length of time that the neighbor's dog was barking. The evidence supported the finding that appellant was lying in wait until Perez came close enough to the sliding glass windows so that he could shoot him. Also, the conclusion that appellant intended to kill is supported by Valenzuela's testimony that he saw appellant dancing and raising the shotgun in the air. Appellant at first retreated, then chased Valenzuela, ultimately attempting to shoot him at point blank range. And, immediately after the shootings, appellant ran back home, and requested that his father drive him to a friend's house, indicating consciousness of guilt.

B. The trial court's failure to issue clarifying instructions with respect to CALJIC No. 8.11 was harmless

Appellant contends that the trial court erred by instructing the jury with CALJIC No. 8.11, which defines implied malice, but then failing to clarify to the jury that implied malice did not apply to first degree murder. Again, we note that appellant has waived his claim of error on appeal by failing to request clarifying instructions before the trial court or requesting that the implied malice definition be excluded from CALJIC No. 8.11. In

any event, we conclude that any failure by the trial court to issue clarifying instructions with respect to CALJIC No. 8.11 was harmless.

CALJIC No. 8.11 defines both express and implied malice. CALJIC No. 8.20, which was given by the trial court, specifically defines murder of the first degree as "all murder which is perpetrated by any kind of willful, deliberate and premeditated killing with *express malice aforethought*." (Italics added.) We presume that the jury followed the instruction that first degree murder requires a finding of *express malice aforethought* and we reject appellant's supposition that the jury could have based its verdict on a finding of implied malice, thereby lowering the jury's burden of proof.

Appellant also suggests that the trial court erred by failing to instruct the jury with CALJIC No. 8.31, which defines implied malice second degree murder. But, the record shows that appellant did not object when the People withdrew its request for CALJIC No. 8.31.[3] Instead, as agreed to by defense counsel, the trial court instructed with second degree murder in CALJIC No. 8.30 as follows: "Murder of the second degree is also the unlawful killing of a human being with *malice aforethought* when the perpetrator intended unlawfully to kill a human being but the evidence is insufficient to prove deliberation and premeditation." (Italics added.)

Even if the trial court erred by giving an instruction which, while correctly stating a principle of law, had no application to the facts of the case, there is no reasonable probability that appellant would have received a better result had the error not occurred. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130; *People v. Watson* (1956) 46 Cal.2d

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3 CALJIC No. 8.31, as given, provided: "Murder of the second degree is also the unlawful killing of a human being when [¶] 1. The killing resulted from an intentional act, [¶] 2. The natural consequences of the act are dangerous to human life, and [¶] 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being."

818, 836.) As previously discussed, the evidence supported the finding that appellant killed Perez with express malice aforethought; the People urged in closing argument that appellant intentionally killed Perez with express malice aforethought; and the People argued that if the jury found implied malice on the part of appellant, he could not be guilty of first degree murder. The jury rejected defense counsel's argument that the People had failed to establish intent to kill, premeditation, and deliberation.

We conclude that any error by the trial court in failing to sua sponte clarify the instructions was harmless.

II. The trial court did not err in failing to stay the sentence on count 5

Appellant contends that the two-year concurrent sentence on count 5 for possession of a firearm by a felon must be stayed pursuant to section 654 because the possession crime was incidental to and the means of accomplishing the murder and attempted murder crimes. We disagree.

"Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one." (*Neal v. State of California* (1960) 55 Cal.2d 11, 19.) The protection of section 654 has been extended to cases where a single act or omission has occurred, or where there are several offenses committed during a course of conduct deemed to be indivisible in time. (*People v. Le* (2006) 136 Cal.App.4th 925, 931-932.) "It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible. [Citations.]" (*People v. Harrison* (1989) 48 Cal.3d 321, 335.) The trial court's factual findings regarding the defendant's intent and objective will be upheld if supported by substantial evidence, and we review the trial court's determination as to intent in a light most favorable to the judgment. (*People v. Andra* (2007) 156 Cal.App.4th 638, 640-641.)

Section 654 does not preclude the imposition of multiple punishment where the evidence shows that the defendant possessed a firearm within the meaning of § 12021,

subdivision (a)(1), with an independent intent, before committing the primary crime. (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1144-1147 [multiple punishment not prohibited by section 654 where the defendant intended to possess a firearm in violation of section 12021, subdivision (a)(1) when he obtained it before the shooting and had a different intent when he shot at a dwelling in violation of section 246].) Thus, "when an ex-felon commits a crime using a firearm, and arrives at the crime scene already in possession of the firearm, it may reasonably be inferred that the firearm possession is a separate and antecedent offense, carried out with an independent, distinct intent from the primary crime." (*People v. Jones*, *supra*, at p. 1141.)

The jury found true the allegations that appellant had discharged and used a firearm in the murder of Perez and the attempted murder of Valenzuela. Appellant possessed the firearm prior to going into Valenzuela's backyard and committing the crimes. Thus, the evidence supports the inference that appellant intended to possess a firearm when he obtained it prior to the shooting and that he had a different intent when he shot at the two victims.

Accordingly, the trial court did not err in failing to stay the sentence on count 5 pursuant to section 654.

DISPOSITION

The judgment is affirmed.

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_____, P. J.

BOREN

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ